No. 8104

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of MARGARET E. TOOEY, a Bankrupt.

MAZIE McLEOD and EDWIN J. MILLER,

Appellants,

vs.

DAN BOONE, a petitioning creditor, and HUBERT F. LAUGHARN, Trustee in Bankruptcy,

Appellees.

Petition for Rehearing

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To the Hon. Curtis Wilbur, Circuit Justice, and to the Hon. Circuit Justices Garrecht and Matthews, Judges of the Circuit Court of Appeals for the Ninth Circuit:

MAY IT PLEASE THE COURT:

On April 20, 1936, this court filed a written opinion disposing of a motion by appellees made, at the suggestion of the court, to dismiss the appeal. The motion was grounded, and the opinion was based, upon the theory that the proceedings in the lower court, and before the referee, involved only a "proceeding" in bankruptcy; and that it did not involve a "controversy" in bankruptcy.

This court adopted the theory in support of the motion and dismissed the appeal, giving its reason therefor in the last two paragraphs of its opinion. In next to the last paragraph of the opinion, this court, among other things, said:

> "The order of the referee * * * merely gave effect to the consent of the creditors that certain moneys payable to them in due course from the funds of the bankrupt estate should be distributed to Dan Boone instead of to them because of their assignment pro tanto to him. This method of recognizing an assignment was in conformity with general order No. 21, sub. 3, (see Remington on Bankruptcy, sec. 737, 6. 900, note 6) requiring such recognition."

Then the court concludes, from the foregoing, as follows:

> *"It is clear, then, that this is a routine proceeding in bankruptcy, and is not a controversy therein."*

Assuming (but not admitting) that the foregoing was a correct statement of the facts as shown by the record, then the conclusion which the court has drawn therefrom would be the correct conclusion. The difficulty lies in the fact that this court has treated the assignment as incontestable—as valid—as being based on a consideration, and upon consent; whereas in fact there was no consideration and no consent; has overlooked the defenses to it on account of fraud; payment for some items made by other claims; and other infirmities; and this court says, in effect, that it is an "assignment." The truth about it is, that it is not an assignment. This being the case,

the conclusion of the court is based on a wrong premise and therefore the conclusion is wrong.

Assuming there was an *"assignment"* and *"consent"* about which there was no question—a valid assignment and "consent"—which was not contested; and that such assignment and consent was entitled to full credit, without contest, then the opinion of the court dismissing the appeal on such state of facts would be correct. In that event it would be a routine proceeding, such as the court has (erroneously) assumed that it is. But where there is no consent, and assignment; where there is a contest on whether there is an assignment and consent, or not, and when one of appellants never signed or knew of the alleged assignment, and gave no consent; then the entire character of the action is changed, and it becomes a "controversy" in bankruptcy, rather than a "proceeding" in bankruptcy. When it is a "controversy" in bankruptcy the appeal is under 24a. We shall undertake in the following paragraphs to conclusively show that this court is wrong in assuming that the action is not a "controversy" in bankruptcy.

The Character of the Pleadings

Whether the action is what is designated as a *"proceeding"* or a *"controversy,"* sometimes, but not always, may be determined by the character of the pleadings. Here the action was initiated by three different petitions filed by Dan Boone, as follows, February 24, 1933; March 13, 1935; and March 22, 1935. One of these petitions is shown in the printed transcript on file herein (pp. 4 to 21 incl.); in which the specific prayer for the allowance of

the money in controversy is shown at page 10; this petition was filed March 22, 1935 (see p. 21). A part of another petition which was filed February 24, 1933, for the allowance of the same items, and the same money, is shown in the transcript at pp. 27 to 31 incl. (this petition is shown in full in the certified copies presented to this court with the motion to supply missing parts of the record, to which we respectfully invite the attention of this court).

The third petition was filed March 13, 1935, and is not shown in the transcript, but is shown by a certified copy lodged in this court with the motion to supply missing portions of the record on the diminution proceedings. This third petition was based on the same items; asked for the same relief; for the same amount; and for the same money. We respectfully invite attention of the court to all three of these documents.

After the last one of these petitions to recover this money was filed with the referee, he did, on March 23, 1935, send out a notice to the appellants herein requiring them to appear on April 2nd, 1935, at a meeting at the office of the referee, for seven purposes, the seventh of which was to deduct $3856.79 from certain creditors' dividends, and pay the same to Dan Boone (see printed Tr. of Record, p. 32).

To these three petitions these two appellants appeared and filed objections to the alleged subrogation, and on May 29, 1935, filed amended objections which are shown in the printed transcript, (pp. 32 to 35 incl.).

The case was then set down for hearing and was heard, and evidence given, and cross-examination had,

and arguments had, by both parties to the litigation, on four different days, (see printed Tr., p. 39, where a hearing was had on April 30, and another hearing had on May 9th (see p. 40, where another hearing was had on May 13); see p. 40 where a further hearing was had on June 4).

The procedure followed in this case is somewhat similar to the procedure followed in the case of *Clements v. Conyers,* 31 Fed. 2d, 563. In that case the appellees, as in this case, argued that the procedure and the pleadings indicated a summary proceeding and not a controversy; that the entire hearing before the referee was summary in its character; and that where there is a controversy *"the proceeding must be by a plenary suit,"* but the court at page 565 said:

> *"While it is true that in the disposition of administrative matters which, generally speaking, are 'proceedings' rather than 'controversies' arising in bankruptcy, the procedure is summary, it by no means follows that the character of the dispute may be conclusively determined by an examination of the procedure adopted."*

"In other words, the mode of procedure cannot alone determine the nature or character of the dispute. That must be determined by the allegations of the bill or petition, and the averments of the response or answer."

We respectfully suggest that the three petitions in the case at bar were in the nature of petitions, or bills in equity; and the objections, or answer, of these two appellants, as shown at pages 32 to 35 are in the nature of answers; the procedure followed by amendments of the

answer; the setting down for the hearing on four different days before the referee; the continuance from time to time; the offering of evidence in chief, and by cross-examination; the offering of witnesses on the part of both litigants to the controversy is the procedure usually followed in plenary proceedings.

In the above case, in commenting on this very situation, the court said:

> *"Moreover, we are not satisfied that petitioner in the present case proceeded summarily. It is true that he filed a petition and obtained an order on the appellee to show cause. But appellee filed an answer and so described it, and the legal steps from then on were similar to those of the ordinary suit in equity. In other words, the matter being at issue, a day was set for trial, and petitioner offered evidence which was met by defendant's evidence. The court entered what it termed a decree. The facts are not unlike those in Re. Rockford Produce and Sales Co., 275 Fed. 811, where we there held that the procedure in that case was not summary."*

So judging from the above decision, and also by the case in *Re. Rockford,* supra, it appears that the proceeding in the instant case was not "summary"; but was *"plenary"* in its character. In the *Rockford* case last above cited, the court said:

> *"The proceedings here under review, while begun by a petition and rule of court, were from their commencement treated as a suit in equity. The petition was the bill in equity. The reply was designated, and in every way met the requirements of an answer. It was amended; the course followed was such as*

would have been pursued, had the pleader wished to amend an answer. This cause was set down for trial in its order, and when reached was heard in open court, and in the same manner as a suit in equity, that is to say, the petitioner presented his witnesses who were cross-examined by the objecting party or his counsel, and, when the affirmative rested, the defendant presented his testimony. Whether this proceeding was summary or 'plenary,' it is evident that appellant secured a full hearing on an issue over which he and the trustee were in controversy, and the determination was made at appellant's as much as the appellee's request. Under the circumstances we think the record discloses a plenary, rather than a summary, proceeding. In Re. Raphael, 192 Fed. 874, 13 C. C. A. 198."

We think it clear that in the instant case the proceedings took the form of a plenary action both as to the form of petitions or bills filed, and the objections which are in the nature of an answer; the hearing of evidence; and the cross-examinations and the order and judgment entered by the referee all were *plenary* in their nature and strongly indicated *"controversy"* rather than a "routine" proceeding.

It is very much like the case of *Re. Hartzell,* 209 Fed. 775, where at 778 the court in speaking of this subject, said:

"The pleading of the appellant thereof, styled an answer, was in substance an intervening petition claiming affirmative relief in respect of its lien against both the trustees and the appellees. The claim against the trustees, if it had any merit, which

is doubtful, became immaterial, as will be seen, and the real controversy is between appellant and appellees over the validity of appellees' mortgage and the priority of their respective liens."

The appeal in the above entitled action was under 24a. A motion to dismiss was made, because not taken under another section of the statute. The court, after discussing the matter denied the motion to dismiss; recited the nature of the pleadings as indicative a *"controversy,"* and held the proceeding was "plenary" in its nature.

We regard the above authority as applicable in the case at bar; and as strongly tending to show that the opinion of this court in the instant case is wrong. When this court said the order of the Referee merely gave effect to the *"consent"* of the creditors, it assumed as true a disputed question. The consent of these two appellants was never in fact given. One never signed it nor knew of it.

The Character of the Contest Is a "Controversy" In Substance

In addition to the pleadings and course which the contest took in the court below, strongly indicating a "controversy," the substance of the contest itself could be nothing other than a "controversy." A *"controversy"* may arise out of what might, at the initiation of the hearing be deemed a "proceeding," yet when a dispute arises in the proceedings, it becomes a "controversy." In other words, if there were no question about the assignment nor consent (which question this court in its decision, evidently, did not hold in mind, nor that there was a

dispute); under such circumstances it might well be designated as a "proceeding," and then this court's opinion would be correct; but when the petitioner, or complainant, by petition, or by bill in equity, comes into court, and files a bill or petition to enforce a document which is denied; to enforce a document to which infirmities are set up in an affirmative defense (as in *Re. Rockford,* 275 Fed. 811), such as in the case at bar, viz., no consideration; no consent; an attempt to enforce an uncompleted gift; payment already having been made; fraud in obtaining the same; not even signed by appellant Mazie McLeod, nor authorized by her; then these matters are shifted from the mere *"routine"* proceeding such as is indicated in the opinion of this court, in the case at bar, to a real *"controversy,"* such as is indicated in the authorities hereinabove, and hereinafter, cited.

In the case of *Re. Hartzell,* supra, heretofore referred to, the litigation at the beginning was one of the mere "routine" proceedings in the ordinary course of bankruptcy administration. There was 960 acres of land subject to certain liens, mortgages, attachments, taxes, and judgments, and homestead. The trustees filed a petition to have the land sold free from all liens, and that the liens be transferred to the proceeds. The appellant bank filed an answer in which it asked relief against the trustees, and against other appellees. Afterwards the interest of the trustee in the dispute ceased, although he was the original Petitioner; and it became solely a controversy between two sets of creditors, as in the instant case; and although it was initiated as a mere "routine" proceeding in bankruptcy, it ended up in a contest as a *"controversy,"*

and the motion to dismiss the appeal was denied. We insist that the reasoning of the above case, as applied to the facts in the case at bar, would result here as it did in that case, viz., a ruling denying the motion to dismiss the appeal.

That the contest in the case at bar is not a "routine" proceeding is strongly indicated in the case last above cited by this language:

> *"The claim against the trustees, if it had any merit, which is doubtful, became immaterial, as will be presently seen, and the real controversy was between appellant and appellees over the validity of appellee's mortgage, and the priority of their respective liens. It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation of the allowance of its claim against the general estate. * * * So far as could be in the nature of things, there was a separate, independent assertion of its mortgage."*

Applying that language to the case at bar, it will be noted that Dan Boone was not asserting his right to the money in controversy as an incident to any claim which he had against the estate, for his claim against the estate for that same money had been denied by the Referee in the three of his petitions. So he came in, in three independent petitions, and asked to have money appropriated from these two appellants from their dividends, which were not then allowed; but were allowed some two months later (see certified copy on file); and while the trustee was and is the stakeholder of this money, and is an appellee, because he has the funds in his hands, yet the

real controversy is between the creditors, viz., Boone, on the one part, and the two appellants on the other part; just as it was in the *Hartzell* case, supra, in which the court in that case further said:

> *"In other words it became manifest nothing would be left for the general estate, and it could be of no interest to the trustees or the general estate whether a deficiency of claim if the application of the proceeds of the mortgaged realty should be that of appellant or that of appellees; so there was then disclosed a 'controversy' in which the trustees had no real interest, but which was between individual lien holders. The district court then proceeded to try the issue between appellant and appellees. * * *"*
>
> *"* * * The case has the substantial aspect of an independent controversy. There is a distinct alignment of parties, the pleadings unconnected attempt ordinary assertion for the allowance of a demand against an estate. * * * Appellant's pleading was in substance and in form, an intervention in equity. The trial court proceeded in a plenary, independent controversy, and filed its conclusion and decree."*

How much like the proceeding in the case at bar is the above? The general creditors, as a whole, are not interested in the dispute. The trustee is only incidentally interested in it as a stakeholder. The bankrupt estate of Margaret Tooey is not interested at all. It is an independent controversy between persons, and which is not a part of the bankruptcy proceeding, the bankruptcy estate is not increased nor diminished hereby, and therefore comes within the definition of a *"controversy"* in the nature of an intervention in equity, by Dan Boone trying

to assert the validity of a document which is denied, and its regularity is challenged; and the suit has none of the aspects of a *"routine"* proceeding in bankruptcy. Under the above authority, therefore, we respectfully challenge the correctness of the decision of this court in the instant case, and we again say that in order to arrive at the conclusion which this court arrived at in dismissing this appeal, it assumed that there was both consent and an assignment. This assumption is disputed; and in order for this court to determine whether there is consent and an assignment or not, which it can enforce, it must first determine the *"controversy"* existing, some of the reasons for denying the validity of the alleged assignment, are set out in our objections, and in our brief, in opposition to the motion to dismiss the appeal.

That part of this court's opinion, therefore, which says that the order appealed from merely gave effect to the *"consent"* of the creditors to the *"assignment"* is wrong. Whether there was a consent or not; and whether there was a valid assignment or not, is disputed, and this determination gives rise to a *"controversy"* (see above authorities).

Therefore, there being no *"assignment,"* as in this court's opinion assumed, and there being no *"consent,"* there is no *"routine,"* but a decided *"controversy"* proceeding.

A "Routine" Proceeding May Develop Into a "Controversy"

In this respect the contest is not unlike that cited under point XIII of our brief on file herein, and like the con-

troversy in *Re. American Telephone Co.,* 211, Fed. 88, wherein the court said:

> *"The effect is to inject into the bankruptcy proceeding a suit to enforce payment of the claim against a creditor of the bankrupt. A matter in which the trustee was not concerned; and one never covered nor contemplated by the bankruptcy act."*

Is not this language very apt and very descriptive of the situation in the case at bar? The setting is that Dan Boone, a creditor, has by his petitions in the nature of bills in equity, injected into the bankruptcy proceeding a suit to enforce payment of a claim against creditors of the bankrupt, *"a matter in which the trustee was not concerned, and one neither covered nor contemplated by the bankruptcy act?"*

Is it not in this respect like the case of *Henrie v. Henderson,* 145 Fed. 316, quoted from at page 16 of our brief, on file, in which the court said:

> *"Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel a specific performance of the contract relating to the sale of land, but here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt.* * * *"

Is not the above language descriptive of the contest at bar, in that it appears that Dan Boone, by his three petitions seeks specific performance of what he alleges is the agreement to compel payment of the $3856.79? Is it not a suit on that alleged, but denied contract, in which the bankrupt estate is not interested? And is not the above

language pertinent, wherein it says the parties who are contending about the matter which is in no way related to or connected with the affairs of the bankrupt? We have heretofore stated that the bankruptcy estate proper, is not interested in the contest; the trustee is not interested in the contest, except as a stakeholder; and the general creditors of the estate are not interested in the controversy. It therefore appears to be a private contest in the nature of a bill in equity, and where the assignment is denied, and its validity is challenged, and the "consent" suggested by this court is denied, then it becomes a "controversy," although it may have been initiated as a "routine." We respectfully submit that the appeal under 24a was properly taken.

The Face of Petitions, of the Document, With the Objections, a "Controversy"

By a mere inspection of the face of the petitions and of the document itself, this court will see that the contest concerns the following points and others:

(a) The document on its face purports no consideration;

(b) The document purports to be voluntary;

(c) The document purports the making of a proposed gift in the future;

(d) The document is not signed by Mazie McLeod, nor authorized by her;

(e) There is no consent, and no assignment (see our brief on file, pp. 9-11).

By reference to the Petitions of Dan Boone, the objections and oral testimony, the court will see there was

another point of contest, viz., that there was fraud in the obtaining of the document; it was never in fact delivered. The question of whether it is a *"controversy"* must be determined by the allegations of the Petition, and response. *Clements vs. Congress,* supra, at page 565.

Therefore, the determination of these disputed questions between the two sets of creditors, in which the estate itself is not interested, and the creditors as a whole not interested, takes the case out of the "routine" definition, and places it in that class of cases which are defined in the above decisions, and many others as a "controversy." A number of these decisions are cited in our brief already on file, to which we respectfully refer.

Conclusion

We feel, therefore, that the court in deciding to dismiss this appeal, did not hold in mind that which may have been initiated as a "routine" proceeding and a "summary" proceeding, may be the very nature of the later developments become a "controversy"; and therefore appealable under 24a. This is the purport of the decisions we have cited; that is what we feel that this court overlooked in its decision. Upon this we feel that we are entitled to a rehearing.

If appellants are right in this, our contention, the case is properly appealable under 24a, and there should be a hearing granted herein, and the motion to dismiss the appeal should be denied.

Very respectfully submitted,

EDWIN J. MILLER

Attorney for Petitioners and Appellants.

Certificate

EDWIN J. MILLER, Counsel for Appellants in the foregoing entitled action, represents to the Honorable Circuit Court of Appeals that the Petition for Rehearing herein merits the attention of the Court, and that same is not interposed for the purpose of delay.

.....

EDWIN J. MILLER.

Dated May 19, 1936.